UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SEATTLE FIRST NATIONAL BANK, as Executor of the Estate of Laurence P. Smith, et al.,
Appellants,

vs.

HILLTOP REALTY, et al.,
Appellees.

HILLTOP REALTY, et al.,
Appellants,

vs.

SEATTLE FIRST NATIONAL BANK, as Executor of the Estate of Laurence P. Smith, et al.,
Appellees.

No. 21,207

[September 13, 1967]

Appeal from the United States District Court
for the Western District of Washington
Northern Division

Before: BROWNING, DUNIWAY and ELY, Circuit Judges

DUNIWAY, Circuit Judge:

Before us are an appeal and a cross appeal. The appeal is by certain partners, doing business as Larry P. Smith & Company, and their wives (collectively, Smith), from a judgment in which they were found liable on the first count of an amended complaint to Hilltop Realty, Inc. (Hilltop) for $2,920.00 compensatory damages and $40,000.00 punitive damages, to Mildred Winslow Ashcraft and Aileen D. Winslow Powell (the sisters) for $2,920.00 compensatory damages and $35,000 punitive damages,

and to Hilltop and the sisters jointly for $75,000.00 attorney's fees. On this appeal, we reverse. The cross appeal is by Hilltop and the sisters from the portions of the judgment that dismissed the second, third and fourth counts of the amended complaint. On the cross appeal, we affirm.

A brief history and analysis of the litigation will serve to point up the questions presented. The action was filed on January 1, 1963. The amended complaint is in four counts. The first charges fraud, the second breach of contract, the third violation of the Ohio anti-trust law (Ohio Rev. Code, ch. 1331), the fourth violation of the Sherman Act (15 U.S.C. §§ 1-2). Jurisdiction, as to the first three counts, rested upon diversity of citizenship (28 U.S.C. § 1332) and, as to the fourth, upon 15 U.S.C. § 15. Jury trial was demanded.

On April 7, 1965, the District Court, on motion for summary judgment, dismissed the anti-trust counts (three and four). Hilltop and the sisters, the plaintiffs, then waived jury trial as to the first and second counts, but not as to the third and fourth. The action went to trial on July 20, 1965, before the court. The trial concluded on August 6, 1965. The record is voluminous; the Clerk's transcript contains 2456 pages of pleadings and other documents, and the reporter's transcript of the trial 2791 pages. Portions of at least 32 depositions were designated to be offered in evidence. The pre-trial order covers 362 pages. There are 371 exhibits, many with sub-exhibits. It must be seldom that so monumental a paper structure has been built upon so thin a foundation as in this case.

The essence of the case is not complex. Hilltop, a real estate firm, was retained by the sisters, owners of 175 acres of land near Cleveland, Ohio, known as "Nutwood," to sell or develop their property, on a commission basis. Hilltop retained Smith, a specialist in the development of shopping centers, to make a study and prepare a report on the potential of Nutwood as such a center, for a fee of $4,500. Smith concluded that Nutwood was not suitable and so advised Hilltop. Smith suggested that it send Hilltop a brief report, at a reduced fee of $2920, and Hilltop agreed. This was done.

Hilltop and the sisters asserted, in the first fraud count, that the report was false, that Nutwood was a good shopping center

site, and that Smith knew it and deliberately made a false report. When Smith was retained, Smith had already been hired by the developers of another nearby shopping center, Longwood, to advise and assist. It was also negotiating to, and later did, acquire that center. It told Hilltop that it was advising on Longwood; it did not reveal that it was negotiating to buy Longwood. Damages are alleged as follows:

> "Plaintiff did rely on defendants' unfavorable report and because of such reliance placed a price on the Nutwood property of $3,500.00 per acre for the whole area, whereas, if it had been truthfully and loyally advised by the defendants as to the suitability of Nutwood for a regional shopping center and related business development, a minimum price of $20,000.00 per acre would have been warranted.
>
> (b) In reliance on such fraudulent advice from defendants, plaintiff abandoned plans to develop or sell the Nutwood property for such a regional shopping center development, and sold all of said property for the price of $3,500.00 per acre, and thereby suffered a loss of $2,887,500.00, plus exemplary or punitive damages pursuant to Ohio law where the wrongs were committed."

The second, contract, count alleges the same facts. It adds that Smith, by producing a false report, breached its contract with Hilltop. The identical damages are demanded. The two anti-trust counts also each repeat the allegations of the first count. The third charges that the defendants (Smith plus certain of its corporate affiliates) combined to prevent the development of Nutwood, and did what count one says they did, in violation of the Ohio anti-trust law. Again the same damages are alleged. The fourth adds the Austin Company, former owner of Longwood, as a defendant. Its allegations, in addition to those designed to show interstate commerce, are similar to those of the third count. Again, the same damages are alleged.

In a statement of factual contentions, filed by court order, the plaintiffs restated and amplified their case, as to each count. They make it quite clear that their anti-trust counts, as well as their fraud and contract counts, depend upon the making by Smith of a fraudulently false report. And as to each count the statement concludes with the following paragraph:

> "Defendants' wrongful acts were the proximate cause with the foreseeable results of plaintiff's damage in selling Nutwood at $3,500 per acre when its true value was a minimum of $20,000 per acre."

It is clear that the making of a false report by Smith, and a consequent sale of Nutwood at a price less than it was worth, are central to the claim stated in each count. Thus, as to the fourth, Sherman Act, count, it is stated that the purpose of the conspiracy was to preclude the development of shopping centers other than Longwood on the east side of Cleveland, and that Smith therefore pursued and secured the contract to make a report on Nutwood and delivered a false report because "discouragement of Nutwood was a necessary step to Smith's continued success . . . . a favorable report on Nutwood would have meant competition" for Longwood.

On these two central issues, the court made the following findings:

> "The court has not been persuaded that the conclusions reached in the Nutwood market analysis were wrong. This is not to say that the analysis was free from error, but the plaintiffs relied on the conclusions of the report and not on the details of the analysis in making their decision to sell the property to Ridge Hills. However, assuming arguendo that the report in and of itself would constitute fraud or breach of contract, the court finds that the plaintiffs have failed to establish by the requisite burden of proof that as a result of such fraud or breach of contract the plaintiffs sustained any damage in the sale of the Nutwood Farm property. . . .
>
> "The plaintiffs also contended that but for the lack of a favorable market analysis they would have been able to find a buyer for Nutwood Farm who was willing to pay more than did Ridge Hills. On the state of the evidence adduced in this case, such contention amounts to no more than speculation or conjecture. Accordingly, the contract cause of action will be dismissed with prejudice."

These findings are fully supported by the record; by no stretch of the imagination can they be said to be clearly erroneous. That

the conclusions of the report were correct and that the plaintiffs did not suffer the damages they claimed, is shown by the record almost to a moral certainty. Several weeks before the delivery of the Smith report another Cleveland developer, Ridge Hills, had begun negotiations with Hilltop for the purchase of Nutwood. The Smith report was mailed to Hilltop on January 8, 1960. On January 13, 1960, Ridge Hills offered to buy the property at $3,500 per acre. At the time it was assumed that Ridge Hills was interested in the property for a shopping center and even after the Smith report Petti, the president of Hilltop, continued to extol the Nutwood property as highly suitable for a shopping center. In fact, Petti urged that if Ridge Hills should purchase the site, Hilltop should be made the exclusive rental agent for prospective store lessees. There is no evidence that Ridge Hills knew of anything but the favorable aspects of the Smith report. On April 29, 1960, the sale of Nutwood to Ridge Hills was completed. For two years following the sale, Hilltop, through Petti, acted as exclusive agent in promoting Nutwood as a regional shopping center. All of Petti's very extensive efforts were unsuccessful, even though he at no time revealed the negative aspects of the Smith report to anyone, and there is no evidence that anyone else did. The proof of the pudding is in the eating. Here, the actual events following the sale of Nutwood demonstrate both that it was not a good shopping center site and that the Smith report was not the cause of a sale of Nutwood at a low price. It was sold for what it was worth.

One might reasonably inquire how it is, in the face of these findings and this record, that the court nevertheless entered the judgment on count one from which the appeal is taken. The court's oral remarks and written decision make the reason clear. The court believed that Smith deliberately concealed from Hilltop the fact that Smith had a proprietory interest in Longwood, leading Hilltop to believe that Smith had no greater interest in Longwood than in Nutwood. However, the court's sense of moral outrage did not lead it to find that the report was materially false, or that the concealment was for the purpose of damaging the plaintiffs (the court thought it was not), or that the plaintiffs were damaged in the manner or in the amount claimed by them. But it did lead the court to try to find some other theory of damage as a means of punishing Smith. It seized on the notion

that Smith should be required to pay to both Hilltop and the sisters, separately, $2,920.00, the price that Hilltop paid for the report. Thus the judgment requires that Smith pay double the price received, plus two large amounts of punitive damages, plus equally large amounts of attorney's fees. Yet the court held that there was no breach of contract, and dismissed the breach of contract count. We know of no possible way in which to sustain so remarkable a result. In the face of the findings that the conclusions of the Smith report were not wrong and that no damage was sustained in the sale of Nutwood, the judgment on count one cannot stand.

The parties are agreed that Ohio law controls. The elements of a cause of action in fraud or deceit are set out in *Lucke v. Robison & Co., Inc.*, 1937, 56 Ohio App. 242, 244, 10 N.E.2d 283, 284. The Ohio court there said a plaintiff must show: "(1) that there was a representation as to an existing or past fact, material to the transaction; (2) that such representation was false at the time it was made; (3) that the representation was made in bad faith with knowledge that it was false; (4) that it was made with the intent of misleading plaintiff into relying upon it; (5) that plaintiff must have relied upon the representations with a right to so rely; and, (6) injury must have resulted as a consequence of such reliance." See also *Green Bay Auto Distributors, Inc. v. Willys-Overland Motors, Inc.*, 1951, N.D. Ohio, 102 F.Supp. 151, 157, aff'd mem., 202 F.2d 151. It seems clear to us that the findings that we have quoted negate, at the very least, items (2) and (6). And in the light of those findings, we cannot see how Hilltop or the sisters were in any way damaged by the actions of Smith. The report they received was not shown to be materially inaccurate, and the record shows that the report's conclusions have been borne out. No damage in the sale price of Nutwood was demonstrated.

Smith may have been unethical in taking the Hilltop account while negotiating the purchase of a possible competitor. Nevertheless Smith fully performed its contract. In Ohio, there is no cause of action for fraud or deceit in the air; plaintiff must show that the fraud has come to rest, causing him injury. As the Ohio court said in *Lake Hiawatha Park Ass'n v. Knox County Agricultural Soc.*, 1927, 28 Ohio App. 289, 162 N.E. 653, 654:

"[F]raud without damage or damage without fraud gives no cause of action, but when these two concur, an action lies." They have not concurred here.

The trial court found damage in Smith's failure to provide a report that could be relied upon, and awarded the price of the report to compensate for that unreliability. But the unreliability was not in the report. Its conclusions were accurate. The unreliability, if any, lay in the fact that, if Hilltop had known of the full extent of Smith's interest in Longwood, it might not have asked and paid for the report, or might have been doubtful as to its validity. In such a case, awarding the price of the report as damages would have been appropriate only, if at all, in an action for recission of the contract. Hilltop has chosen to stand on the contract and sue for the damages flowing from Smith's claimed fraudulent performance of it. The action must fail with the failure to prove either that the performance was fraudulent or that it caused such damages.

We are also of the opinion that the failure to prove the alleged fraud or that it caused any damage is dispositive of Hilltop's cross-appeal on the trial court's dismissal of the other counts. The trial court did not dismiss the anti-trust counts for this reason; it dismissed because it was of the opinion that even if damages could have been proved they would stem from the alleged fraud and not from any anti-trust violation. As authority for this conclusion the trial court cited *Schatte v. I.A.T.S.E.*, 9 Cir., 1950, 182 F.2d 158; *Glenn Coal Co. v. Dickinson Fuel Co.*, 4 Cir., 1934, 72 F.2d 855; and *Peterson v. Borden Co.*, 7 Cir., 1931, 50 F.2d 644. See also *Conference of Studio Unions v. Loew's, Inc.*, 9 Cir., 1951, 193 F.2d 51, 54-55. We need not stop to decide whether the trial court was correct in its reasoning. The finding that the report was accurate in its conclusions and that the damages claimed were not suffered is as fatal to the breach of contract and anti-trust counts as it is to the fraud count.

But the plaintiffs argue that they were deprived of their rights to jury trial on the anti-trust counts in that: "All of the Smith partners and Treiger were alleged to have violated the anti-trust laws on substantially the same facts as in the fraud count. . . . A jury could find them guilty of the anti-trust violations, proxi-

mately resulting in substantial damages to the Winslow sisters and Hilltop from the sale of their property even though, on the fraud count, the court held that the burden of proof was not sustained." (Page 21 of Hilltop's opening brief as cross-appellants.)

The difficulty with this argument at this stage of the case is that the alleged facts of fraud and damage are the same throughout the four counts of the complaint, and a favorable finding on both would be necessary to recover on either of the anti-trust counts. But plaintiffs voluntarily tried these issues to the court on the fraud and contract counts. They lost on both issues and we affirm the findings of the trial court. Therefore, on remand plaintiffs would be estopped to reopen either of these issues by principles of *res judicata* and law of the case. See *Partmar Corp. v. Paramount Pictures Theatres Corp.*, 1954, 347 U.S. 89, 100-101; *Arnold v. Arnold*, 9 Cir., 1966, 356 F.2d 873; *Warren v. Lawler*, 9 Cir., 1965, 343 F.2d 351; *Clinton v. Joshua Hendy Corp.*, 9 Cir., 1960, 285 F.2d 848, *cert. den.* 366 U.S. 932; *Morgan v. Inter-Continental Trading Corp.*, 7 Cir., 1966, 360 F.2d 853.

The judgment on count one (paragraphs 4, 5, 6, 7 and 10 of the judgment) is reversed with directions to enter a judgment for defendants on that count. In all other respects the judgment is affirmed.

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Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco 1, Calif.

ittle, Gandy, Stephan, Palmer & Slemmons
1710 IBM Bldg.,
Seattle, Washington

Dear Sir:

In case No. 21207 Seattle First Natl Bank exec estate of L P Smith v. Hilltop Realty an opinion was this day filed, in accordance with which a Judgment or Decree was filed and entered judgment of Decree of the Court below.

Pursuant to Rule 26, and unless the mandate is stayed by the order of the Court, or unless a petition for a rehearing of the cause be filed meantime, and as provided by Rule 23, a mandate of this Court will be due to issue on the expiration of 30 days from date hereof.

Time for certiorari petition, Civil cases: 90 days Criminal cases: 30 days.

Sincerely,

Wm. B. LUCK
Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
NOV 29 1967
WM. B. LUCK, CLERK

SEATTLE FIRST NATIONAL BANK, as Executor of the Estate of Laurence P. Smith, et al,

Appellants,

vs.

HILLTOP REALTY, et al,

Appellees.

No. 21,207

HILLTOP REALTY, et al,

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vs.

SEATTLE FIRST NATIONAL BANK, as Executor of the Estate of Laurence P. Smith, et al,

Appellees.

Before: BROWNING, DUNIWAY and ELY, Circuit Judges.

O R D E R

The petition for a rehearing and the suggestion of a hearing en banc are denied. The cost bill of the Austin Company for a docket fee is disallowed since it does not appear that this fee was paid. The cost bill of the Seattle First National Bank is allowed, except to the extent that it seeks to recover the cost of the copy of the original papers

and the copy of the reporter's transcript for the use of its counsel. To this extent that cost bill is disallowed. The motion for oral hearing on the petition for rehearing and on the petition for review of cost bills is denied.

James R. Browning

Ben. C. Duniway

OPTIONAL FORM NO. 10
5010-103

UNITED STATES GOVERNMENT

Memorandum

TO : Clerk Luck

DATE: November 28, 1967

FROM : Judge Duniway

SUBJECT: Seattle First National Bank, etc. v. Hilltop Realty, et al, No. 21,207

All of the judges concerned having concurred in the Order, the Clerk will please file.

Ben. C. Duniway

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1–7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85–508, § 12(e), 72 Stat. 348.

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85–554, § 1, 72 Stat. 415.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85–554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88–439, § 1, 78 Stat. 445.

§ 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931.

§ 2107. Time for appeal to court of appeals

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11. June 25, 1948, c. 646, 62 Stat. 963; May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104.

Rule 19 SUPREME COURT RULES
Note 1

PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

OHIO REVISED CODE

Section 1331.12:

No statute of limitation shall prevent or be a bar to any suit or proceeding for any violation of Section 1331.01 to 1331.14, inclusive of the Ohio Revised Code.

I. WRITTEN MEMORANDUM DECISIONS AND EXCERPTS FROM COURT'S ORAL REMARKS

A. Tentative Oral Opinions of August 6, 1965 (Tr. 2565-2573, 2576-2579):

THE COURT: The Court indicated to you yesterday that he would at this time make known to both parties his tentative thoughts in connection with the factual and legal issues presented in this case. In so doing the Court wants both parties to know that, with one exception, that I will mention later, the thoughts expressed today are tentative only, merely my impressions at this time, and not final in any respect. In other words, the Court poses the challenge to each of you of convincing me to the contrary.

This is the first time that I have done this. I don't know that it is a wise procedure, but I thought that in view of all of the evidence that has gone into this case thus far, it would be well to make my tentative impressions and thoughts known and let you concentrate on those in your briefs.

This case has been very well prepared by counsel on both sides. Both are to be commended for this. As a matter of fact, this is one of the most thorough and best-investigated cases that has come before me. This being so, there is a mass of exhibits as well as a great volume of testimony. The Court has not had the opportunity of examining all of the exhibits thoroughly or of weighing all the evidence carefully. It may very well be that he has overlooked or failed to give proper emphasis or failed to draw appropriate inferences from the evidence in giving you my tentative thoughts or impressions at this time. But as I say, I am putting the burden on each of you to establish to the contrary any thoughts that I express which are unfavorable at the present moment.

Now I think I will first discuss the cause of action predicated on fraud.

The relationship between Hilltop and Smith, that is, the nature of the service to be performed by Smith in its contractual undertaking with Hilltop, was such that it required a full disclosure by Smith to Hilltop of Smith's every interest in Severance. Nothing less would do.

Hilltop knew that Smith had performed services in connection with Severance. In fact, as I recall, the excellence of their performance at Severance was the motivating factor in the employment of Smith. Treiger and the others with whom he discussed or communicated about the situation may very well have thought that in originally revealing to plaintiffs that which Treiger did about Smith's relationship with Severance, Smith was making a sufficient disclosure of the conflict of interest which Smith knew to exist, but in this he was wrong. Smith had the duty to make a full disclosure of its contemplated purchase of Severance, or at least their interest therein, or to refuse the job.

I am satisfied that this concealment was originally and throughout the entire relationship between Smith and plaintiffs calculated, deliberate and intentional, as distinguished from inadvertent, accidental or misunderstanding. The Court is of the very definite opinion that the concealment in law amounted to constructive fraud. This is the exception to which I referred earlier.

The Court questions, however, that the concealment was prompted by any desire on the part of Smith to seek pecuniary gain at the expense of plaintiffs, or to cheat or defraud them in any way. I am for the present inclined to the view that the concealment was for the purpose of respecting the confidence of Austin. Such an intent, however, does not justify the concealment or

excuse what the law deems to be fraud. Furthermore, it is not to the credit of Smith that they took affirmative action to further conceal the true relationship with respect to Severance after plaintiffs became suspicious and asked for an explanation. Smith at all times proceeded on the theory that they had a choice between revealing all or only a part of their true relationship with Austin respecting Severance, but in law they had no choice. Smith's only alternative if it desired to respect the confidence of Austin was to decline the undertaking. The only choice which existed was that of plaintiffs to accept or reject Smith's employment after being fully informed of all of the facts.

Now, other than as stated, the Court expresses no views with respect to the contention of actual fraud at this time, although I think it only fair to state that I of the present belief that both Petti and O'Neill relied upon the report of Smith and upon the presentations made in connection with that report, and I am also of the present view that the Winslow sisters in turn relied upon the report by acting upon the recommendations of O'Neill, which were based upon the report.

Now a word about the cause of action based on contract. First of all, it is my present view that the Winslow sisters are not third party beneficiaries as that term is known in law, and hence, that they are not entitled to maintain an action on the contract between Hilltop and Smith.

The Court is of the view that in submitting the report to Petti, Exhibit 29, I mean, there was a contractual obligation on the part of Smith to reveal in the report the full nature of their interest in Severance, and the failure to do so was a breach of the contract. I may be wrong, but that is my present view. In other respects in which it is contended that the contract was

breached, the Court is presently of an open mind. That is, I have no thoughts one way or the other.

Next, I would like to say a few words about the defense of the statute of limitations which is contended by Smith as to the additional or added defendants made parties in the amended complaint lodged with this Court on July 20, 1964. The Court previously held in a memorandum decision dated March 29, 1965 that I could not hold as a matter of law that the cause of action as to the additional defendants was time-barred, and such holding had the effect of postponing the decision on this question until the time of trial.

The critical questions posed are whether the plaintiffs exercised due diligence for the period commencing on or about February 16, 1961, following the meeting in Cleveland with Treiger, and the critical date of on or about July 21, 1961 — I am not sure of these dates, gentlemen, I have not taken the trouble to look them up definitely — and also whether certain of the defendants are estopped to assert the statute of limitations.

I think I am prepared to find that the plaintiffs at the meeting in Cleveland on February 16, 1961, I think that is the correct date, were lulled into a position of false security by the representations made by Treiger at that meeting. As the Court recalls, there is no evidence of what the plaintiffs did in this respect during the approximate five-month period following the meeting, or at any time thereafter up until the original action was filed. Some time between February 15, 1961 and January 4, 1963, when the original complaint was filed, the plaintiffs apparently became suspicious or sufficiently dissatisfied with the representations made by Treiger that they consulted counsel, which resulted in the original filing of this action. But insofar as I recall, there is no evidence of when such occurred.

I therefore pose this question: May I on the evidence now before me conclude that the plaintiffs were justified in waiting until after approximately July 20, 1961 before instituting action against the added defendants?

On the other phase of this question, it was brought to the Court's attention at the time the dismissal as to the additional defendants based upon the statute of limitations was presented that some of the defendants, Eberhart, Kelly and Steichen, I believe, had failed to comply with the assumed business name law in the State of Washington, that plaintiffs had no knowledge of their interest in the partnership, and that because of such failure the plaintiffs were prejudiced. At this moment I do not recall the exact dates that these three partners became such, but assuming arguendo plaintiffs' contentions to be proved, the Court does not recall any evidence presented during the trial of this case from which it can find prejudice. Accordingly, unless there is such evidence, and I ask plaintiffs' counsel to call it to my attention in their brief, I must hold that the three mentioned defendants are not estopped to assert the statute of limitations.

The Court now comes to what he considers the critical question in this case, namely, damages, both of a compensatory and of a punitive or exemplary nature.

Both sides have produced reputable and outstanding experts both in the field of economic analysis of regional shopping center developments and on the subject of value. I have given a lot of thought to this subject, but I have not yet examined all of the evidence critically with respect thereto. I must say, however, that at this moment I am not convinced that Nutwood Farms had a potential as a regional shopping center, or put in another way, that its highest and best use was for such a purpose, or that it had the value which plaintiffs contend.

In other words, Counsel, what I am trying to say is that I entertain doubt that the property had any greater value than the price obtained from the Harry Ratner interests, I believe they were. Ridge Hills Development Company, I believe it was called. Plaintiffs' counsel may be able to convince me to the contrary, but assuming they do not, I take this opportunity of posing a further problem: I think there is little doubt but that Hilltop has been damaged in the amount that it paid Smith, approximately $2,900.00, I believe, for a report which was in law worthless because of the concealment. Should Hilltop be awarded such damages and in addition thereto, punitive damages? That is the question I pose. Also in the absence of a finding of actual damage as to the Winslow sisters may the Court award nominal damages, and if so, may I and should I award punitive damages in addition? Also, should punitive damages, if awarded, include reasonable attorneys' fee for all or part of the work done by plaintiffs' counsel?

In the event the Court should allow punitive damages, a further and additional problem is presented: Against whom should the judgment run?

I do not recall evidence that any partner authorized the concealment or the misrepresentations with respect to Smith's true interest in Severance, but I am confident that there is evidence from which the Court could find that the acts and omissions of Treiger were ratified by one or more of the partners, and I ask plaintiffs' counsel to call such evidence to the Court's attention in the briefs to be presented.

* * *

MR. STEPHAN: Yes, your Honor, all right. There is only one problem, it is a legal problem, we think most of it is factual that we can marshal. There was filed with the Court, but I don't know whether it has come

to the Court's attention yet, a brief, and we haven't seen any answer to it, which we thought very clearly established under Ohio law that under the facts here the Winslow sisters were clearly third party beneficiaries.

THE COURT: I saw that, and I don't think I agree with you.

MR. STEPHAN: All right.

MR. WHITE: We have a brief on that, your Honor, but until we heard your remarks we didn't know whether to file it. There is at least one additional case in Ohio which, at least under our interpretation, makes it very clear that they are not.

MR. STEPHAN: It would be very helpful to have your brief.

THE COURT: Ohio law is not very much different from the Washington law or the general rule. I will concede that they were an incidental beneficiary, but I don't believe they reached the status of being third party beneficiaries.

No, as I view this, except with respect to some of the phases of exemplary damages I think this is pretty largely factual and that the third party beneficiary is a legal question, but I suggest that you not spend too much time on that because my mind is pretty well resolved on that phase of it, right or wrong.

On the statute of limitations, there is no legal question, it is factual and what there is in the testimony that is before me in the case.

MR. WHITE: As I indicated earlier, your Honor, one of the serious legal questions, at least in our minds, and I have discussed this to some extent with Mr. Stephan and given him citations, is the matter of the Ninth Cir-

cuit rule that an expert witness as to value may not consider events occurring after the —

THE COURT: I am quite well aware of the rule on which you rely, and you may very well be right, but what I want you to do is to point out in your brief those portions which you think violate the rule.

MR. WHITE: I will do that.

THE COURT: I was conveying, however, to you my impressions with the testimony concluded, my present impressions, but maybe you can convince me to the contrary. I thought it would be well for you to know where to put your emphasis.

MR. STEPHAN: Oh, it is very helpful, your Honor, it is very helpful. We will work on it at once.

THE COURT: I may have vacillated from time to time with respect to Mr. Petti's reliance, but after considering it fully I am of the present view that he relied, although you may convince me that I am wrong.

MR. WHITE: We are sure going to try, anyway.

THE COURT: A good real estate man never gives up. I am satisfied in my own mind from the immediate actions following the report that he did, but you may convince me to the contrary.

MR. STEPHAN: We realize the great mass of economic data and we are going to address ourselves primarily to the factual issue of the desirability of the property for a regional shopping center as we understand it.

THE COURT: And now another thing I didn't mention where you might in connection with actual fraud concentrate, try to point out to me from the evidence a motive on the part of Smith, where they stood to gain or profit. It would be easy, of course, if they themselves had bought the property or arranged with someone in

their own organization to purchase the property, but it is hard for me at this moment to see a motive of pecuniary gain.

MR. STEPHAN: We believe, your Honor, from the evidence that we can very clearly establish that.

THE COURT: Or as to constructive fraud, if it was something that naturally flowed from the other whether they had the motive or not, is another factor. But I have given you as far as my tentative thinking has gone.

B. Written Memorandum Decision of October 27, 1965 (Tr. 2770-2777):

At the time this matter was submitted to the Court for decision it was agreed that the question of oral argument would be deferred until after the Court had read the posttrial briefs. It was also agreed between counsel at an early stage in the proceedings, which agreement was acquiesced in by the Court, that if the Court deemed it helpful to a decision in this case the Court would visit Cleveland for the purpose of viewing the area in dispute. Inasmuch as counsel have been so diligent, competent and thorough in the presentation of testimony and in the preparation of posttrial briefs, the Court does not believe that oral argument or a view of the premises would be of material assistance in the decision of the case. Accordingly, the time has come when the Court must render a decision in this long and hard fought case. Whether this decision will constitute a terminus or merely a milestone in this lengthy litigation the Court can only speculate. Suffice it to say that the Court recognizes and appreciates the diligent efforts which counsel have thus far expended on behalf of their respective clients and in clarifying the issues for the Court. The case has been well tried and counsel

have given their clients the benefit of every reasonable argument and shred of evidence.

The Court has not been persuaded that the conclusions reached in the Nutwood market analysis were wrong. This is not to say that the analysis was free from error, but *the plaintiffs relied on the conclusions of the report* and not on the details of the analysis *in making their decision to sell the property to Ridge Hills.* However, assuming arguendo that the report in and of itself would constitute fraud or breach of contract, the Court finds that the plaintiffs have failed to establish by the requisite burden of proof that as a result of such fraud or breach of contract the plaintiffs sustained any damage in the sale of the Nutwood Farm property. The Court does not accept the opinions of the land value experts on either side of the controversy, and inasmuch as plaintiffs have failed to sustain their burden of proof the issue must be resolved in favor of the defendants. Defendants' principal expert based his conclusion upon what the Court believes to be an erroneous premise and the opinion of plaintiffs' expert is predicated somewhat on hindsight, information not available at the time of, or prior to, the sale of Nutwood, and comparable sales which the Court cannot accept as probative of the value of Nutwood. It therefore becomes unnecessary for the Court to pass on defendants' posttrial motions to strike the testimony of Mr. Fenton and Mrs. Tyler.

Spec. 1

The plaintiffs also contended that but for the lack of a favorable market analysis they would have been able to find a buyer for Nutwood Farm who was willing to pay more than did Ridge Hills. On the state of the evidence adduced in this case, such contention amounts to no more than speculation or conjecture. Accordingly, the contract cause of action will be dismissed with prejudice.

The cause of action for the fraudulent concealment of Larry Smith & Company's proprietary interest in the Severance Center arose when the market analysis report on Nutwood was delivered to the plaintiffs in January of 1960. At this point in time the defendants Imus, Orndahl, Kelly, Eberhart and Steichen were neither partners in Larry Smith & Company nor residents of the State of Washington, and were served with process outside of the State under the Washington "long arm" statute, RCW 4.28.185, and F.R.Civ. P. 4(e). However, it appears that the only possible basis of service under the long arm statute is if the fraud arose out of the transaction of business within the State. Since the fraud occurred before these defendants became partners, there appears to be no way in which their alleged participation in the fraud could have arisen out of their transaction of business within the State of Washington. Accordingly, the service of process upon them was ineffectual and the fraud cause of action will be dismissed as to them without prejudice.

The Court finds that the remaining defendants are liable for actual fraud committed by Larry Smith & Company in concealing from Hilltop the fact that Smith was then conducting negotiations to acquire an interest in the Severance property. Such concealment was material to plaintiffs' course of conduct and caused plaintiffs to falsely believe that Smith was no more than a consultant on the Severance development, which belief was knowingly and intentionally fostered by Larry Smith & Company. Hilltop relied on such belief in selecting Smith to produce a market analysis and all plaintiffs relied thereon in determining their course of conduct after the negative report

Spec. 1

was received. By the very nature of the relationship between the parties, the plaintiffs had a right to rely on an absence of such a conflict of interest on the part of one from whom expert advice was sought. Inasmuch as the concealment of the conflict of interest made the Nutwood report totally untrustworthy, the plaintiffs also suffered financial injury as a proximate consequence of the concealment. Plaintiff Hilltop was damaged in the amount of the price it paid for the market analysis and the plaintiff sisters were knowingly deprived of the benefit of their contract with Hilltop whereby Hilltop obligated itself to procure the analysis for their benefit. Although the Court cannot from the evidence ascertain what value a reliable market analysis had to the sisters, it does find that it did have some definite value. *Thus, the Court concludes that all eight elements of fraud under Ohio law have been proven by clear, cogent and convincing evidence. Plaintiff Hilltop is entitled to recover the amount it paid for the market analysis and the plaintiff sisters are entitled to a recovery of $100.00 as nominal damages.*

The Court has carefully reviewed the Ohio authorities and has *concluded that this case is an appropriate one for the award of punitive damages. The decisions of the Ohio courts clearly demonstrate that punitive damages are recoverable in a case such as this where "the defendant's conduct shows a wanton or reckless disregard of the legal rights of others . . ." Saberton v. Greenwald,* 66 N.E.2d 224, 229 (Ohio 1946), quoting from 13

Spec. 4

Spec. 1

Spec. 2 and 3

Spec. 5(b)

Spec. 7

Ohio Jur. § 137; *Sears v. Holly*, 178 N.E.2d 91 (Ohio Ct. App. 1960); see *Waters v. Novak*, 115 N.E.2d 420 (Ohio Ct. App. 1953). *The Court has also concluded that the case of Schumacher v. Seifert, 172 N.E. 420 (Ohio Ct. App. 1930), authorizes an award of punitive damages where, as here, actual though nominal damage is found.* Spec. 6

The Court further finds that the fraudulent concealment by Treiger of Smith's prospective proprietary interest in Severance was authorized by the defendant Orndahl, then the manager of the New York office, and by defendant Imus, then the manager of Smith's Eastern Division, and that such acts of authorization were within the scope of their respective employments by Larry Smith & Company. CF. *M. J. Rose Co. v. Lowery*, 169 N.E. 716 (Ohio Ct. App. 1929). Furthermore, *the concealment was* not only calculated, deliberate, and intentional, it was *done pursuant to company policy,* as defendants so clearly demonstrate in their posttrial brief (Sec. XIII, pp. 99 *et seq.*). *The company's method of doing business, of keeping the partners in its far-flung organization informed, and its system of reading files make the inference inescapable that one or more of the partners was aware of the concealment and at least acquiesced therein. Furthermore, Treiger's attempts to justify and minimize the concealment at the meeting with Petti and O'Neill on August 10, 1960, in response to a written inquiry from Petti must have come to the attention of, or may even have been authorized by, one or more of the partners. Any one of these factors standing alone would be sufficient basis for the Court's find-* Spec. 11 and 12

ing that the fraudulent concealment is chargeable to the partnership, and the partners who were originally made defendants are jointly and severally liable for actual and punitive damages. RCW 25.04.130, .150(1).

All that remains is to fix the amount of punitive damages and this is a subject to which the Court has given a great deal of thought. *Larry Smith & Company willfully concealed the conflict of interest and when the plaintiffs became suspicious of the conflict their investigations logically turned to the substance of the Smith market analysis and substantiating report. The mistakes, errors and examples of unprofessional workmanship which they therein found and subsequently continued to find, together with the concealed conflict of interest and other suspicious circumstances which they discovered, fully justified the prosecution of this legal action. Although the plaintiffs have been unable to prove all of their suspicions, they have proved to the Court's satisfaction that their expenses in this lawsuit are a result of the defendants' fraud. The Court, therefore, proposes to fix punitive damages, and he has in mind, as a minimum, such amount as will reimburse plaintiffs' expenses in the prosecution of this action and also the possible award of an attorney fee as is authorized by the law of Ohio. Davis v. Tunison,* 155 N.E.2d 904 (Ohio 1959).

Spec. 9 and 10

The Court desires to confer with counsel preparatory to a further hearing on the exemplary damage issue

and such conference is set for November 8, 1965 at 11:00 a.m.

DATED this 27 day of October, 1965.

(s) W. T. BEEKS
United States District Judge

C. Court's Remarks at Oral Argument on April 22, 1966 (R. 2134-2135):

THE COURT: . . . I did find that and I stand by that. I think it is a deliberate, wanton concealment in complete disregard of the rights of the plaintiffs in order to serve Smith's own ends in what they conceived to be their understanding and their duty with The Austin Company, but at the same time I am sure that they did not do it for direct financial profit in connection with the Severance project. They did it in connection with Austin Company's good will, there is no question about that, to retain that.

MR. STEPHAN: We briefed that phase, your Honor, and I won't labor our view.

THE COURT: Well, that has been my feeling all along on that particular phase of it. But it was deliberate and intentional, there is no doubt about it.

D. Final Written Memorandum Decision of May 2, 1966 (Tr. 2777-2791):

Defendants have sua sponte filed a brief raising issues of law relative to punitive damages which the Court thought had been decided and laid to rest long ago. However, because of additional authorities cited therein the Court permitted defendants' counsel to argue these issues orally at the hearing which was originally set for argument solely of factual issues re punitive damages. As a result of defendants' argu-

ments, the Court has undertaken a complete review of the applicable law, the evidence and its prior decisions.

As a result of such review the Court has decided to amend its prior decision in one particular. Defendants contend that the terms "actual damages" and "nominal damages," as used by the Ohio courts, are mutually exclusive and that nominal damages will not under Ohio law support an award of punitive damages. In the memorandum decision of October 27, 1965, the Court found that the sisters had been knowingly deprived by the defendants of the benefit of the contract which the sisters made with Hilltop, by which Hilltop obligated itself to procure a market analysis of Nutwood for the sisters' benefit. The Court found that a reliable market analysis did have a definite but undeterminable pecuniary value to the sisters and the Court therefore awarded them $100.00 "as nominal damages." By this the Court meant, as is clear from the context, compensatory damages, though nominal in amount. On review of the evidence in the case, however, *the Court has concluded that there is sufficient evidence in the record to support a finding that the fair market value to the sisters of a reliable and trustworthy Nutwood market analysis was at least equal to the price which Larry Smith & Co. billed Hilltop for their analysis, or $2,920.00.* The memorandum decision of October 27, 1965, is herewith amended accordingly.

Spec. 2 and 3

Defendants have asserted that under the contract between Hilltop and the sisters, Hilltop had no obligation to provide a market analysis. Defendants contend that the contract was in effect the grant of an option to Hilltop for an exclusive listing of Nutwood predicated upon Hilltop accomplishing two of five enumerated objectives, one of which was the procurement of a market

analysis of the Nutwood property. Although the defendants may be correct as to the nature of the contract, *when Hilltop exercised the option by undertaking to provide a market analysis of the Nutwood property it became obligated to provide a* reliable and trustworthy *market analysis. Hilltop did in fact provide a market analysis, which was rendered totally unreliable and highly suspect by the subsequent discovery of Smith's tortiously concealed pre-existing conflict of interest. This, together with errors in the Smith market analysis, the delivery of a "substantiating report" which also was not free from error, the competitive positions of Nutwood and Severance and other suspicious circumstances, fully justified the prosecution of the fraud and breach of contract counts of this suit. The Court also believes that the anti-trust counts were justified up to a point which the Court need not determine.* Thus, Smith fully performed its contract, in spite of what later proved to be inconsequential errors in its report. However, *Smith not only rendered its own product, the very object of the contract, totally worthless by its fraud, it also deliberately withheld information, the disclosure of which in all probability would have rendered this expensive lawsuit unnecessary. In the Court's view these facts amply justify an award of punitive damages in an amount sufficient to compensate plaintiffs for the expenses of this lawsuit,* if the law of Ohio permits the imposition of such damages.

Spec. 4

Spec. 9 and 10

Spec. 9 and 10

The argument of the defendants is that Ohio law requires a showing of actual malice, *i.e.*, "ill will or

hatred," before punitive damages may be awarded. The Court has expressly found that the defendants' conduct was not so motivated. Defendants rely on the five[1] most recent punitive damage decisions of the Ohio Supreme Court as demonstrating a transformation in the relevant law which has not been explicitly expressed by the Ohio Court, but which nevertheless overrules sub silentio the Ohio opinions relied upon by this Court in its prior memorandum decision for its holding that it was enough to award punitive damages under Ohio law that plaintiffs have shown that defendants willfully and deliberately committed a fraud on the plaintiffs in wanton disregard of plaintiffs' rights.

The Court based its conclusion on two Ohio cases, *Saberton v. Greenwald,* 66 N.E.2d 224 (1946) and *Sears v. Holly,* 170 N.E.2d 91 (Ohio Ct. App. 1960).

In *Saberton v. Greenwald, supra,* the defendant jeweler sold plaintiff a wristwatch, representing it as a new watch, when in fact it was a twenty- to twenty-five-year-old watchworks in a new case. The watch cost about $20.00 new, but was sold to plaintiff for $38.15. Defendant had refused to rescind the transaction when plaintiff discovered the true age of the watch. The trial court had refused to instruct on the issue of punitive damages. The Court of Appeals affirmed, but the Supreme Court reversed, holding that the case was a proper one for the award of punitive damages, since it was an action for "a tort which involves the ingredients of *fraud,* malice *or* insult." 66 N.E.2d 224 (Syllabus No. 2) (emphasis added). The Court also quoted with approval from 13 Ohio Jur. § 139 a statement that Ohio law permits recovery of punitive damages if "the

[1] *Saberton v. Greenwald,* 66 N.E.2d 224 (1946); *Smithhisler v. Dutter,* 105 N.E.2d 868 (1952); *Davis v. Tunison,* 155 N.E.2d 904 (1959); *Rogers v. Barbara,* 164 N.E.2d 162 (1960); *Pickle v. Swinehart,* 166 N.E.2d 227 (1960).

wrong complained of involves ingredients of *fraud,* malice, *or* insult, *or a wanton and reckless disregard of plaintiffs' rights.*" 66 N.E.2d at 230 (emphasis added). Certainly from the facts in the *Saberton* case it cannot be said that the defendant's fraudulent conduct was motivated by "ill will or hatred" toward the plaintiff.

Defendant, however, contends that the case of *Smithhisler v. Dutter,* 105 N.E.2d 868 (1952), marked the beginning of a judicial transformation of Ohio law on the question of punitive damages. Indeed, the syllabus by the court does state, "In tort actions, the question of punitive damages may not ordinarily be submitted to a jury in the absence of actual malice." 105 N.E.2d at 868. However, this was an action for alienation of affection. Obviously punitive damages could not in such an action be based on fraud and the only question on appeal was whether implied malice would justify an award of punitive damages. The court affirmed the two lower courts, holding that implied malice was sufficient. This Court is of the opinion that the proper construction of this holding is that for public policy reasons, *in an action for alienation of affections,* implied malice is sufficient, although in other tort actions actual malice would ordinarily be required. *if malice* (not fraud or insult) is the basis on which punitive damages are sought. This is the only construction which is consistent with the Ohio Court's quotation of the second syllabus of *Saberton* and its statement, "The rule in Ohio seems to be that ordinarily, in tort actions, punitive damages are allowable in cases in which *fraud,* malice *or* insult appears. . . ." 105 N.E.2d at 871 (emphasis added). Thus, the *Smithhisler* case represents an exception to the ordinary rule.

The next case cited by defendants which supposedly illustrates the "judicial trend" toward requiring "ill will or hatred" is *Davis v. Tunison,* 155 N.E.2d 904

(1959). The *Tunison* case was an action for malicious prosecution by the payee of a check, who had been charged by defendant with using the check to obtain money by means of false pretenses and with intent to defraud. Plaintiff had refused to honor the check on the ground that the plaintiff's signature had been forged thereon. Defendant filed the charges after being advised by a handwriting expert that the signature on the check was in fact that of the plaintiff. Although a justice of the peace bound the plaintiff over to the grand jury, the grand jury returned a "no bill." Defendants rely on Syllabus No. 1 by the Ohio Supreme Court, "In an action for malicious prosecution, actual malice must be shown in order to justify an award of punitive damages." This, they contend, requires a showing of actual malice in every case where punitive damages are sought. This Court, however, holds, for reasons which follow, that the *Tunison* rule is restricted to actions for malicious prosecution. First of all, as in *Smithhisler,* fraud was not claimed as a basis for an award of punitive damages. Secondly, Syllabus No. 2 by the Court would allow punitive damages even in malicious prosecution actions if the prosecution is instigated "Wantonly, recklessly, and without justification." Thirdly, the Court stated at 155 N.E.2d 906, 907:

> "(I)n order to justify a jury in awarding punitive damages within its discretion, there must be the ingredient of *fraud,* malice *or* insult . . .
>
> "We are of the opinion that, before the question of punitive damages may be submitted to a jury, the *fraud,* malice, *or* insult connected with the tort must be actual and not imaginative." (Emphasis added).

Finally, after noting that implied malice was found to be sufficient in the *Smithhisler* case, the Court went on to find that actual malice, not implied malice, was required in an action for malicious prosecution. "Other-

wise, there would be too great an inhibition upon the part of people to originate a prosecution for crime, and, in many cases, justice would be defeated because of a fear of the risk in exposing a crime." 155 N.E.2d at 907. Thus the effect of the *Tunison* case is merely a refusal by the Ohio Supreme Court for reasons of public policy to extend the exception made in *Smithhisler* to actions for malicious prosecution. The *Tunison* case clearly leaves the normal rule unaltered, *i.e.*, that punitive damages may be based on "fraud, malice or insult." Any confusion arising from *Tunison* results from the fact that, as in *Smithhisler,* by the very nature of the cause of action asserted, malice was the sole basis upon which punitive damages could be predicated and hence the Court framed its syllabi solely in terms of malice.

The other two cases cited by defendants as part of the supposed "trend" are *Rogers v. Barbara,* 164 N.E.2d 162 (1960), and *Pickle v. Swinehart,* 166 N.E.2d 227 (1960). Both were actions for malicious prosecution and, notwithstanding defendants' contentions, the Court believes they basically do no more than repeat the rule of the *Tunison* case. It is true that *Rogers* overruled *Tunison* to the extent that *Tunison* would have allowed punitive damages, *in an action for malicious prosecution,* for a prosecution instigated "wantonly, recklessly, and without justification." The reason given is that the very elements of an action for malicious prosecution require more than wantonness or recklessness. As the Court stated, quoting from 22 Am. Jur., *False Imprisonment,* §§2, 3, "In the case of malicious prosecution . . . *the gist of the cause of action is malice or evil intent*" (emphasis by the Court). In essence, the Court was saying that if the gist of a cause of action is "malice or evil intent," how can the standard for awarding punitive damages in such an action be anything less?

Pickle v. Swinehart, supra, merely held that "legal malice" is not synonymous with "actual malice" and is insufficient for an award of punitive damages *in an action for malicious prosecution.*

In spite of the diligent efforts of defendants' counsel in expounding the law of Ohio, the fact remains that the *Saberton* case is the most recent decision of the Ohio Supreme Court construing the Ohio law of punitive damages where fraud is claimed as the basis for such damages. It has never been disapproved or overruled. *Saberton clearly allows punitive damages in such a case without a showing of "ill will or hatred."*[2] } Spec. 7

Furthermore, there is the intermediate appellate court decision of *Sears v. Holly,* 178 N.E.2d 91 (Ohio Ct. App. 1960), which was decided after all of the above cases relied upon by defendants. Plaintiff there alleged fraud in the sale of an automobile. The Court held that mere fraud was not sufficient for an award of punitive damages, but that "extreme and exceptional conduct" is required. The Court also cited prior Ohio cases which required "a gross or malicious fraud or something showing a very corrupt condition of affairs," and that the defendant's wrongdoing must be "intentional and deliberate, or have the character of outrage frequently associated with crime." 178 N.E.2d at 92. *The defendants in the case at bar were certainly guilty of "extreme and exceptional conduct" constituting a "gross fraud" which was "intentional and deliberate."* } Spec. 5(b)

Another case more recent than those relied upon by defendants is *Nagel v. Prescott & Co.,* 36 F.R.D. 445

[2] Defendants also cite *New York, C. & S.L.R. Co. v. Grodek,* 186 N.E. 733 (1933). To the extent it is inconsistent with *Saberton* the latter must obviously control.

(N.D. Ohio 1964). Chief Judge Connel said, "Under Ohio law, in an action to recover damages for a tort which involves the ingredient of *fraud or* malice, a jury may go beyond the mere rule of compensation to the party aggrieved and award exemplary damages." 36 F.R.D. at 449 (emphasis added). The Court cited *Saberton* and quoted from *Smithhisler* the same statement at 105 N.E.2d 871 which is quoted herein at page 5, *supra*.

Defendants quote language from the *Waters* case in their favor, but the facts of the case do not sustain their position. Furthermore, to the extent there is any language in the *Waters* or *Sears* cases which is inconsistent with this Court's interpretation of Ohio law, its precedental value is negated by the more recent expression of Ohio law of the intermediate appellate court in *Levin v. Elyria Sign Co.*, 206 N.E.2d 38 (Ohio Ct. App. 1965). That court held that an award of punitive damages must be predicated upon "malice, *fraud, intentional wrongdoing or other outrageous conduct of a similar nature.*" 206 N.E.2d at 39 (emphasis added). The Court cited *Saberton, Smithhisler* and *Tunison*.

Defendants' brief also attempted to show that Ohio follows the "ratio rule" of punitive damages and, by reference to other jurisdictions, that such ratio may not exceed approximately 20 to 1. *However, as plaintiffs' counsel pointed out on oral argument, the Ohio Supreme Court in Saberton allowed plaintiff an opportunity to recover $5,000 punitive damages where compensatory damages were only $38.15. This is a ratio in excess of 128 to 1.* Spec. 8

The final argument of defendants to be considered is the contention that inasmuch as under Ohio law attorney fees in an action such as this are classed as com-

pensatory damages (even though predicated upon circumstances justifying an award of punitive damages), attorney fees can be awarded only to reimburse plaintiffs' actual out-of-pocket expenses for attorney fees and may not be awarded where, as here, the attorney is retained on a contingent fee basis. Defendants cite no Ohio cases which are directly in point. In fact, the only direct authority cited is 25 C.J.S., *Damages*, §50(d). However, the sole authority cited by C.J.S. is *Houston & T.R. Co. v. Oram*, 49 Tex. 341. One case from one state can hardly be said to establish a general rule.

If the rule contended by defendants were to be upheld it would result in an unwarranted windfall to undeserving defendants and would unjustly penalize attorneys who in good faith accepted employment on a contingency basis. Such a rule would run counter to the very policy reasons which have induced the courts to recognize contingency agreements. *Gruskay v. Simenauskas*, 140 Atl. 724 (Conn. 1928).

Furthermore, under defendants' theory, if the award of attorney fees were strictly compensatory the award would be based on the *actual* attorney fee and not on a *reasonable* attorney fee. However, it is not only the practice of Ohio trial courts in such cases to instruct in terms of a "reasonable" attorney fee, *Sears v. Holly*, 178 N.E.2d 91 (Ct. App. 1960); *Davis v. Tunison*, 155 N.E.2d 904 (1959); *Housh v. Peth*, 133 N.E.2d 340 (1956); *Waters v. Novak*, 155 N.E.2d 420 (Ct. App. 1953); *Smithhisler v. Dutter*, 105 N.E.2d 868 (1952); *Columbus Ry. Power & Light Co. v. Harrison*, 143 N.E. 32 (1924); *United Power Co. v. Matheny*, 90 N.E. 154 (1909); the Ohio appellate courts have specifically stated that the applicable standard is a "reasonable" attorney fee. *Smithhisler v. Dutter, supra; M. J. Rose Co. v. Lowery*, 169 N.E. 716 (Ct. App. 1929); *United Power Co. v. Matheny, supra; Finney v. Smith*, 31

Ohio St. 529, 27 Am. Rep. 524 (1877); *Roberts v. Mason,* 10 Ohio St. 277 (1859).

Also, if, as defendants contend, attorney fees were strictly compensatory Ohio law would necessarily require the admission of evidence of the amount of the actual attorney fee in every case where such a fee was claimed. The Ohio rule, however, has been to the contrary for over one hundred years. In *Roberts v. Mason,* 10 Ohio St. 277, 282 (1859), the Court said, "No evidence in this case appears to have been given to the jury on the subject of counsel fees; nor do we think such evidence ought to have been given or received." The Court nevertheless held that "the jury, which has the power to punish, has necessarily the right to include the consideration of proper and reasonable counsel fees in their estimate of damages." The rule of *Roberts v. Mason* is patently inconsistent with the rule contended for by defendants. It would therefore appear that if this Court has committed error, such error was in taking note of plaintiffs' contingent fee agreement in the first place. This is not an error of which defendants may complain.

The Court therefore finds that plaintiff Hilltop Realty, Inc. shall recover $2,920.00 as compensatory damages and that the plaintiffs Mildred Winslow Ashcraft and Aileen D. Winslow Powell shall ~~jointly~~ recover a like amount. The Court also awards to plaintiff Hilltop Realty, Inc. punitive damages in the amount of $40,000.00 and to the plaintiffs Mildred Winslow Ashcraft and Aileen D. Winslow Powell jointly punitive damages in the sum of $35,000.00. Such award is conditioned upon plaintiffs filing of a waiver

Spec. 2 and 3

Spec. 5 and 10

of any claim to costs in this action. *The Court awards jointly to Hilltop Realty, Inc., Mildred Winslow Ashcraft and Aileen D. Winslow Powell the sum of $75,000.00 as a reasonable attorney fee.* Such a fee will not adequately compensate plaintiffs' counsel for all of the time they have devoted to this case but the Court believes, considering all the circumstances, that such an amount is reasonable. } Spec. 10

This memorandum decision, together with the prior memorandum decision of October 27, 1965, insofar as it has not been modified by this decision, shall serve as findings of fact and conclusions of law. Counsel for plaintiffs may present a form of judgment to the Court on May 6, 1966, at 9:30 a.m.

DATED this 2nd day of May, 1966.

(s) W. T. BEEKS
United States District Judge

II. EXCERPTS FROM ADMITTED FACTS SECTION OF PRETRIAL ORDER (R. 1054-1265)*

1. Plaintiff Hilltop Realty, Inc., hereinafter called Hilltop, at all times material hereto was and is now a corporation incorporated under the laws of Ohio with its sole office at Lyndhurst, Ohio, an eastern suburb of Cleveland, except that it had an office in Willoughby, Ohio, another eastern suburb of Cleveland, from 1961 to early 1963. Hilltop was engaged in the sale of real estate, primarily residential, in the eastern suburbs of Cleveland. Henry Petti was president of Hilltop. . . .

2. Plaintiff Mildred Winslow Ashcraft was married to Edwin W. Ashcraft in June, 1962. At all times material hereto she has been a resident of Washington, D.C.

*References in said admitted facts to sources thereof, in the pre-trial record, i.e., to depositions or exhibits, have been deleted.